No. 75-1888

In the Supreme Court of the United States

OCTOBER TERM, 1976

BRUBRAD COMPANY, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
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In this action the owner of property in Brooklyn, New York, sought to have its lease agreement with the United States Postal Service[1] reformed or interpreted so as to provide for an adjustment of the amount of rental payments reflecting devaluation and inflation from the base year of 1964, when the lease was entered. The lease was for an initial period of 10 years at a rate of $510 per month, with four five-year renewals at the option of the Postal Service, at the rates of $475, $500, $525, and $550 per month, respectively (Pet. App. A-2). As the district court noted, the complaint seeks reformation of the lease, but in its briefs and oral argument the plaintiff asserted instead a right simply to have the lease interpreted as

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[1]The owner-lessor, Brubrad Company, a partnership, and the United States Postal Service are the successors in interest to Brubrad Corporation and the United States, respectively, who originally entered the lease.

already reflecting an intention to permit adjustment (Pet. App. A-3).[2]

In a Memorandum and Order, dated November 6, 1975, the district court held that the complaint, whether viewed as an action for reformation or as a suit for a declaratory judgment construing the contract, should be dismissed (Pet. App. A-2 to A-10). The court of appeals affirmed on April 2, 1976, in a brief opinion delivered from the bench (Pet. App. A-1).

The district court correctly found that the parties to the lease had dealt at "arm's length" and that the lease was not unconscionable when made (Pet. App. A-7). The court pointed out that although the lease agreement may have proven to be an unwise one for petitioner, that alone did not justify altering its terms (*ibid.*). More important, the court found that the parties' agreement to vary the amount of the monthly rental payment for the four five-year option periods following the initial 10-year lease (Pet. App. A-6) was designed to accommodate the parties' estimation of the dollar value of the lease at those future times (*ibid.*).[3] Consequently, the court correctly concluded that the construction of the lease agreement sought by the petitioner, even if it were a legally permissible one, did not conform with the parties' intention and was not required by law.

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[2]Recognizing that *Columbus Ry.* v. *City of Columbus*, 249 U.S. 399, precludes such a readjustment regarding inflation, petitioner stated in the district court that the gravamen of its complaint is devaluation. Inflation was relevant to obtaining relief, it asserted, since *Perry* v. *United States*, 294 U.S. 330, had denied recovery due to devaluation where deflation had cancelled the loss (Affirmation in Opposition to Cross-Motion to Dismiss, pp. 2, 3).

[3]Petitioner's argument (Pet. 13) that many government contracts contain cost-plus or cost-of-living provisions serves only to emphasize that the petitioner willingly entered a contract that dealt with this problem in a different fashion (*i.e.*, specific rental increases), which it now asserts was inadequate.

Beyond that, however, construction of the lease in the manner petitioner suggests is prohibited by law. In the exercise of its power under the Constitution to regulate the value of money, see Article I, Section 8, Clause 5, Congress proscribed contractual provisions granting a right to an amount of money measured in gold or a particular kind of coin or currency. Joint Resolution of June 5, 1933, 48 Stat. 113, 31 U.S.C. 463(a) (quoted at Pet. App. A-8). Both the district court and the court of appeals correctly relied on this section as a basis for decision (Pet. App. A-1, A-7).

Petitioner asserts (Pet. 5-11), however, that one of the gold clause cases, *Perry* v. *United States*, 294 U.S. 330, prohibits the application of Section 463(a) to the contractual relationship involved here. But *Perry* found Section 463(a) unconstitutional only in regard to contracts entered into prior to its enactment. The Court concluded in *Perry* (294 U.S. at 354, emphasis added)

> * * * that the Joint Resolution of June 5, 1933, *in so far as it attempted to override the obligation created by the bond in suit*, went beyond the congressional power.

The lease in this case was entered over 30 years after the enactment of Section 463(a).[4] Petitioner's argument that the principle of *Perry* should be applied to subsequent obligations of the government (Pet. 11-14) ignores the fact that prospective application of Section 463(a) does not result in the repudiation of an obligation. Rather, under circumstances such as those involved in this case, the statute serves as notice to persons entering contracts with the government that the interpretation of their obligations in the manner sought by the petitioner here is against public policy. The parties to such an agreement may seek to

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[4]Section 463(a) applies to obligations "in gold or a particular kind of coin or currency, or *in an amount of money of the United States measured thereby*" (emphasis added).

compensate for potential devaluation and inflation by providing for an adjustment in the contract price, as the parties have done in this case. But one who has chosen this alternative may not thereafter complain that the bargain fairly struck was nevertheless unwise.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.

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